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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/647,013	08/21/2003	L. Pernille Olesen	POULaksel APP	1473

7590

02/22/2005

Poulsen Roser ApS
620 South Front Street
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EXAMINER

HWU, JUNE

ART UNIT PAPER NUMBER

1661

DATE MAILED: 02/22/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/647,013

Applicant(s)

OLESEN ET AL.

Examiner

June Hwu

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 14 December 2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

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DETAILED ACTION

The amendment filed December 14, 2004 has been received.

The text of those sections of Title 35, U.S. Code not included in this action can be found in the prior Office action.

35 USC § 112

1st and 2nd Paragraphs

The rejection of claim 1 under 35 U.S.C. 112, first and second paragraphs, (dated September 20, 2004) is withdrawn in view of Applicants' amendment.

Claim Rejections - 35 USC § 102

Claim 1 remains rejected under 35 U.S.C. 102(b) as being anticipated by the European Plant Breeder Right (PBR) application number 19990065 filed on January 29, 1999 and published on April 15, 1999, more than one year prior to the filing date of this instant application, taken in view of Applicants admission that the claimed cultivar was first available for sale on July 16, 2001 (IDS filed on April 15, 2004).

Claim 1 remains rejected under 35 U.S.C. 102(b) as being anticipated by the European PBR application number 20000291 filed on February 24, 2000 and published on April 14, 2000 (note: there was a typographic error on the published day of the previous Office Action stating "4" when actually the day should be "14") and grant number 7939 dated July 16, 2001 and published October 15, 2001, more than one year prior to the filing date of this instant application, taken in view of Applicants admission that the claimed cultivar was first available for sale on July 16, 2001 (IDS filed on April 15, 2004).

Response to Arguments

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Applicants' remarks filed December 14, 2004 have been fully considered but are not considered persuasive for the following reasons:

Applicants argue that for seventy years the Patent Office has never suggested that the sale or public availability of a plant outside of this country enables a publication filed more than one year prior to the filing of that application, and that the Office has made a policy change without appropriate procedures under USC Title 5 Federal Administrative Procedures Act (FAPA). This argument has been fully considered, however, is not persuasive because the examination process is an adjudication, not a rule making.

Because none of the arguments support Applicants' conclusion that a foreign breeder's right certificate over a year prior to domestic filing cannot be a bar under 35 USC § 102(b), even where Applicants made the plant stock available to the public, albeit outside this country, over a year prior to domestic filing, the applicability of a rejection, where both of these conditions arise, under 35 USC § 102(b) is maintained.

Conclusion

No claim is allowed.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37

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CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

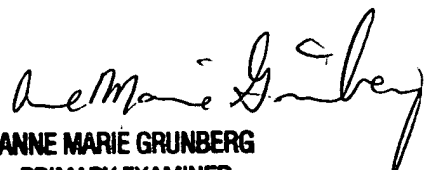
Future Correspondence

Any inquiry concerning this communication or earlier communications from the examiner should be directed to June Hwu whose telephone number is (571) 272-0977. The Examiner can normally be reached Monday through Thursday from 6:30 a.m. to 5:00 p.m.

If attempts to reach the Examiner by telephone are unsuccessful, the Examiner's supervisor, Andrew Wang, can be reached on (571) 272-0811. The fax number for the organization where this application or proceeding is assigned is (571) 273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

JH


ANNE MARIE GRUNBERG
PRIMARY EXAMINER